United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-2643

To be argued by
WILLIAM F. MCNULTY

United States Court of Appeals
FOR THE SECOND CIRCUIT

MATTIE G. DIXON, as Administratrix of the Estate of L. C. SHERMAN, JR.,

Plaintiff-Appellee,

against

80 PINE STREET CORPORATION, RUDIN MANAGEMENT CORP., RAISLER CORP., THE CONSOLIDATED EDISON COMPANY OF NEW YORK, ADSCO MANUFACTURING CORP., RUTHERFORD L. STINARD, EMERY ROTH, RICHARD ROTH and JULIAN ROTH, d/b/a EMERY ROTH & SONS,

Defendants-Appellees,

CITY OF NEW YORK, THE BOARD OF INQUIRY OF THE DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, and LOUIS BECK,

Appellants.

BRIEF FOR DEFENDANT-APPELLEE, ADSCO MANUFACTURING CORP.

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Introductory Statement

This is an appeal by the City of New York (hereinafter designated "the City"); the Board of Inquiry of its Department of Buildings and by Louis Beck, Esq., counsel to said Board (all non-parties to this action), from an order made on November 14, 1974, by District Judge Whitman Knapp and entered the next day in the office of the Clerk of the United States District Court for the Southern

District of New York, denying the motion of said Appellants for a protective order under the Federal Rules of Civil Procedure, quashing a subpoena served two months previously on Mr. Beck by the attorney for the plaintiff Administratrix herein, based upon their claim that the information sought to be disclosed by the subpoena was generally privileged under the law of New York and, as such, was immune from disclosure.

The appeal arises out of a diversity action commenced in the United States District Court for the Southern District of New York as the result of the steam pipe explosion that took place on the commercial premises owned by the defendant, 80 Pine Street Corporation, at No. 80 Pine Street in lower Manhattan on May 3, 1972, in which seven people were killed. One of said persons was the decedent, L. C. Sherman, whose Administratrix, Mattie G. Dixon, brought the present wrongful death and conscious pain and suffering action against the named defendants, all of whom she alleges were responsible in some way for the explosion.

The action has not yet been noticed for trial but is still in the preparation stage. The controversy presently before this Court concerns the right of the City and its Board of Inquiry to claim that the information concerning the cause of the explosion obtained by them during the course of a hearing conducted by the Board into the cause or causes of the explosion for the purpose of preventing future occurrences of this type, is privileged information, the disclosure of which to the plaintiff and the other litigants in this action would effectively destroy the confidentiality with which it was given during the Board's hearing and thus jeopardize the prospect of the City's obtaining confidential information at future hearings by the Board into similar occurrences. Appellants predicate their claim of privilege on an allegedly greater public interest in obtaining complete and confidential information

at such hearings than that of the plaintiff and defendants herein in finding out what may have caused the explosion resulting in Sherman's death.

Appellants concede, as Judge Knapp found (38a),* that the law of New York is applicable—a conclusion with which the defendant, Adsco Manufacturing Corp. (hereinafter designated "Adsco") agrees (App's Br., p. 7)—but they contend in their Brief that Judge Knapp incorrectly analyzed a recent holding of the New York Court of Appeals in *Cirale* v. *80 Pine Street Corp.*, 35 N. Y. 2d 113 (1974), which established the requirement "that the governmental agency come forward and show that the public interest would indeed be jeopardized by a disclosure of the information" sought to be discovered before the claim of privilege will be enforced, in a case which involved the same explosion and the same demand for disclosure and claim of privilege by the City as is involved in the case at bar (*Cirale, supra,* 119).** It is the contention of Adsco that, based on the Record presently before this Court, Judge Knapp correctly held that Appellants have not made such a showing and that, for this reason, his order denying their motion to quash the subpoena herein should be affirmed.

Judge Knapp, in part, based his holding on a separate report rendered by Federal Magistrate Martin D. Jacobs, which appears on pages 39a through 41a of Appellants' Appendix, after the District Court had referred the disclosure issue to him on consent of all the parties (38a).

Among other recommendations which he made, Magistrate Jacobs stated in his report to Judge Knapp that he had personally examined a metallurgical report filed with the City Board of Inquiry by an expert named George J. Fischer, which consisted of 13 pages and 32 figures or

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* All page references in this brief are to Appellants' Appendix.

** The opinion of the Court of Appeals in the *Cirale* case is reproduced at pages 28a-34a of Appellants' Appendix.

illustrations and that (41a):

> "The report is a metallurgist analysis of certain extension joints and other physical evidence at 80 Pine Street and also of the same type of joint used at two other premises (59 Maiden Lane and One Chase Manhattan Plaza). The latter portion of the report (pp. 11 *et seq.*) contains certain conclusions. In keeping with my views as to the report of the Board this report should be produced except for its conclusions."

In denying Appellants' motion Judge Knapp adopted all of the recommendations of Magistrate Jacobs, including the one relating to the limited disclosure of the Fischer report, and directed "the parties to arrange prompt compliance therewith" (38a).

In her complaint in the case at bar the plaintiff Administratrix charges Adsco, the manufacturer of an expansion joint, with negligence in the design and manufacture of the joint and with a breach of implied warranty of the joint's fitness for use and alleges that said negligence and breach of warranty were a proximate cause of the explosion resulting in the decedent's death (11a-15a).

It will thus be seen that, although the attorneys for Adsco, one of the multiple party defendants herein, did not serve the subpoena in question on Mr. Beck, said defendant has a genuine interest in the outcome of this appeal on the issue of the Appellants' privilege claim against disclosing material facts adduced at the City's Board of Inquiry hearing relative to the cause of the explosion.

Question Presented

The following is the sole question presented by the appeal of the City and its agents:

> 1. Did the District Court err in finding that, under the criteria laid down by the New York Court of

Appeals in *Cirale* v. *80 Pine Street Corp.*, 35 N.Y. 2d 113, Appellants failed to "come forward and show that the public interest would indeed be jeopardized by a disclosure of the information" sought to be obtained from them by the plaintiff (*Cirale, supra*, 118, 33a)?

The Court below answered this question in the negative (38a).

Opinion and Order Below

District Judge Knapp's Memorandum Opinion and Order denying Appellants' motion to quash the subpoena served by the plaintiff will be found at pages 37a and 38a of the Appellants' Appendix. After reviewing the nature of the information sought to be disclosed by the subpoena and the relief requested by Appellants, the District Court stated (38a):

> "The matter came before me on October 10, 1974, when I ruled that there was no general privilege to withhold the data requested.[1] Since the City had presented no facts indicating to what extent, if any, it would be 'burdened' by production of the matter subpoenaed, my ruling on lack of privilege would in ordinary course have ended the matter. However, attorneys for both parties to the motion (plaintiff and the City) indicated a disposition to accommodate each

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"As a footnote to his Opinion and Order Judge Knapp stated (38a):

> "[1] This question is controlled by *Cirale* v. *80 Pine Street Corp.* (1974), 35 N.Y. 2d 113, 359 N.Y.S.2d 1. In that case, the Court of Appeals held that plaintiff had not shown 'adequate special circumstances', as required by CPLR 3101(a)(4), in order to be entitled to the discovery sought. In so holding, the court indicated that based on the record before it, the City had not established its claim of privilege as to this information. The City concedes that the record before me contains nothing that was not presented to the state courts."

other, and were agreeable to my suggestion that the matter be referred to a Magistrate. I accordingly referred the motion to Magistrate Jacobs, who has now submitted the annexed report. I find Magistrate Jacobs' report to be eminently fair, approve its recommendations and direct the parties to arrange prompt compliance therewith.

So Ordered."

In his report to Judge Knapp, Magistrate Jacobs made the following recommendations, in addition to the one that the contents of the Fischer metallurgical report concerning the expansion joint "be produced except for its conclusions" (41a):

> "Accordingly, I recommend that the City be directed to produce for inspection and copying by all parties to the action, including defendants, the transcripts of the testimony of all witnesses and related exhibits, the physical evidence, and the report of the Board of Inquiry except for its 'conclusions and recommendations.' "

In reaching this conclusion Magistrate Jacobs relied upon two United States District Court decisions in the Eastern District of New York, to wit, *Reliable Transfer Co.* v. *United States,* 53 F.R.D. 24 [E.D.N.Y. 1971] and *Craig* v. *Eastern Airlines, Inc.,* 40 F.R.D. 508 [E.D.N.Y. 1966], which made a distinction between a governmental agency's disclosure of "facts" adduced during the course of an investigation and its disclosure of "opinions based on those facts", which "might cause undue reticence by the investigating officer, and prevent fulfillment of the purpose of the investigation" (*Reliable Transfer Co., supra,* p. 23). Following this rationale, Magistrate Jacobs concluded that "Where a governmental body has made an investigation of an accident, public policy dictates that any facts ascertained by it, as distinguished from opinions

or conclusions, should be discoverable" and he based his recommendations to Judge Knapp on this principle, which the District Court, in turn, adopted (38a).

The opinion of the New York Court of Appeals in the *Cirale* case, which Appellants concede is the governing precedent on the privilege issue presented in the case at bar (App's Br., p. 7), dealt with the same claim of privilege made by the City against the plaintiff and defendants in that case, as is made herein, which would immunize the City against disclosing the information sought to be obtained by the litigants, to wit, the names and statements of witnesses appearing at the City's Board of Inquiry hearing and any documentary and physical evidence which would shed any light on the cause of the explosion occurring at 80 Pine Street on May 3, 1972, which resulted in injury and death to seven innocent members of the public (29a). After reversing an affirmance by the Appellate Division of the Supreme Court of an order made at Special Term granting the motion by the plaintiff and defendants in that case for discovery of this information on the ground that the movants had not fully complied with the provisions of Sections 3101 and 3120 CPLR by demonstrating "adequate special circumstances" for desiring the information sought (3101[b] CPLR), the Court of Appeals then addressed itself to the issue presently before this Court on the appeal herein, to wit, "the City's claim that the information sought is privileged and confidential" (31a).

The Court recognized the existence of the "common-law privilege" accorded governmental agencies, whose officers have confidential communications with others in the performance of the public duties "where the public interest requires that such confidential communications or the sources should not be divulged" (31a-32a). The Court went on to state, however, that "The hallmark of this privilege is that it is applicable when the public interest would be harmed if the material were to lose its cloak of

confidentiality" (citing authorities), and "It has been said that the privilege is a qualified one, which may be ineffective when it appears that the disclosure of the privileged information is necessary to avoid the risk of false testimony or to secure useful testimony (See *People* v. *Keating* [286 App. Div. 150, 153])." Although the Court rejected the interpretation that the privilege is such a "qualified" one when claimed in a civil action, it held that any "balancing" of litigants' needs against those of the public is "in reality" "two sides of the same coin" because "Public interest encompasses not only the needs of the government, but also the societal interests in redressing private wrongs and arriving at a just result in private litigation" and that "the balancing that is required goes to the determination of the harm to the over-all public interest" resulting from disclosure which would have to be "more harmful to the interests of the government than the interests of the party seeking the information" (33a).

The gravamen of the Court's holding on this issue was (*Cirale, supra,* 118-119):

> "By our decision today, we do not hold that all governmental information is privileged or that such information may be withheld by a mere assertion of privilege. There must be specific support for the claim of privilege. Public interest is a flexible term and what constitutes sufficient potential harm to the public interest so as to render the privilege operable must of necessity be determined on the facts of each case. Such a determination is a judicial one and requires that the governmental agency come forward and show that the public interest would indeed be jeopardized by a disclosure of the information. Otherwise, the privilege could be easily abused, serving as a cloak for official misconduct. (8 Wigmore on Evidence [McNaughton Rev.], § 2379, pp. 803-810; *United States* v. *Reynolds,* 345 U. S. 1; *Stratford Factors* v.

State Banking Dept., 10 A D 2d 66.) Of course, in some situations it may be difficult to determine if the assertion of the privilege is warranted without forcing a disclosure of the very thing sought to be withheld. In such situations, it would seem proper that the material requested be examined by the court *in camera*. (See *United States* v. *Reynolds, supra; Stratford Factors* v. *Sate Banking Dept., supra.*) However, it will be the rare case that *in camera* determinations will be necessary. A description of the material sought, the purpose for which it was gathered and other similar considerations will usually provide a sufficient basis upon which the court may determine whether the assertion of governmental privilege is warranted."

In *Cirale* the Court was not required to decide whether the City had made the requisite showing of paramount harm therein because it found that the parties seeking disclosure had failed to comply with the provisions of Section 3101(b) CPLR and it reversed the order of the Appellate Division on that ground "with leave to the respondents to proceed in accordance with Article 31 of the CPLR" and that "If further disclosure proceedings are pursued, the City shall be allowed to object, asserting its claim of common-law privilege upon a proper showing that the privilege is warranted" (34a).

In the case at bar Appellants have again asserted a claim of privilege and contend that they have done so upon a sufficient showing of greater harm resulting to the public interest by revealing some of the factual data obtained during their Board of Inquiry hearing than would be done to appellees herein if such information were not disclosed.

District Judge Knapp, by his order incorporating therein the recommendations of Magistrate Jacobs, has found that, on the basis of Record herein, Appellants have failed to

make such a showing because "The City concedes that the record before me contains nothing that was not presented to the state courts" in the *Cirale* case (38a, ft.n. 1).

POINT I

Appellants have not sufficiently shown a risk of greater harm to the public interest in disclosing the factual data ordered disclosed by the District Court than the prospect of harm that would be done to the parties to this action if their claim of privilege is upheld.

In appealing from the order of District Judge Knapp in the case at bar, Appellants again base their claim of privilege on the need for confidentiality in their conduct of hearings in the public interest, such as the hearing of the Building Department's Board of Inquiry in the case at bar, just as the City did in the *Cirale* case, where they argue that "the Court of Appeals did not specifically hold that the material there subpoenaed was privileged, but rather merely left this question open for decision in the first instance by the lower courts in the event further disclosure proceedings were pursued" (App's br., p. 9).

It is submitted that, in making this argument, what the Appellants seem to overlook, which did not escape the attention of Judge Knapp, is that the Record before the District Court in the case at bar presented no greater showing of undue harm to the public interest by disclosing what the Court ordered disclosed herein than the record in the *Cirale* case presented where it was held that "the City had not established its claim of privilege as to this information" (38a, ft. n. 1) because, if it had, the Court of Appeals would have so found, which it concededly did not do.

Although Appellants argue that the "affidavit" of Mr. Beck, counsel to the Board of Inquiry, submitted in sup-

port of their motion to quash the subpoena in the case at bar, "constituted a sufficient showing to warrant a finding that" the material requested "was privileged" (Apps' Br., p. 9), it is submitted that the affirmation of Mr. Beck clearly fails to support this conclusion. In his affirmation Mr. Beck merely states (22a-23a):

> "It is the experience of deponent that in order to perform its function, often there must be assurances given to prospective witnesses that their testimony will be treated as confidential, in order to elicit information that might otherwise not be forthcoming, or as to which constitutional protection may be claimed by such witnesses. Since a major responsibility of the Board is to prevent similar occurrences in the future by reason of the knowledge demanded, it is submitted that the public interest requires that the testimony given at such a Board of Inquiries should be protected, and a plaintiff referred to other more customary means of seeking to establish his cause of action."

Mr. Beck further states in his affirmation that it would be "burdensome and expensive to the witnesses and to the City of New York to review and obtain" the names and addresses of those who appeared and testified at a hearing of the Board of Inquiry (23a).

It is submitted that the asserted "experience" of Mr. Beck in support of Appellants' claim for the need of confidentiality in examining witnesses before the Board is no more than a conclusory statement on his part in support of the City's claim of privilege in the case at bar, which is unsupported by any facts. In the face of the recommendations of Magistrate Jacobs in the case at bar, adopted by Judge Knapp, "that the City be directed to produce for inspection and copying by all parties to the action, including defendants, the transcripts of the testimony of all witnesses and related exhibits"; "the report of the Board of Inquiry except for its 'conclusions and recommenda-

tions' ", and the first two pages of the Fischer report, analyzing the extension joints used in the building at 80 Pine Street and in two other buildings (41a), it is difficult to understand how Appellants can now argue that "Mr. Beck's affidavit describing the nature of this investigation and the need for confidentiality, without more, can constitute "a sufficient showing to warrant a finding that this material was privileged" (Apps' Br., p. 9).

Neither Magistrate Jacobs nor Judge Knapp directed a full disclosure of the report of the Board of Inquiry herein. They both carefully refrained from ordering disclosure of the opinions, "conclusions and recommendations" of the witnesses and officials who appeared before the Board at its hearing into the causes of the explosion and what could be done to prevent similar occurrences in the future (38a, 40a-41a). Furthermore, it should be noted that Magistrate Jacobs made his recommendations to Judge Knapp only after conducting his own "*in camera*" examination of the Fischer report, which could prove to be vital to the interests of Adsco, the manufacturer of the allegedly defective expansion joint, in the case at bar. In his report to Judge Knapp, Magistrate Jacobs stated (40a):

> "The City stated [at the hearing before him] that if directed by the Court it would have no serious objection to producing the data requested except for the Fischer report and so much of the Board Report which contained the conclusions and recommendations."

It will thus be seen that, insofar as the report of the Board itself is concerned, Judge Knapp ordered the disclosure of no more than the City itself had previously indicated a willingness to produce at the hearing before Magistrate Jacobs. Insofar as the Fischer report is concerned, which might also have a substantial bearing on the rights of Adsco as a defendant in the case at bar, it is submitted that the criterion that should be applied in deter-

mining Appellants' claim of confidentiality is the one recently applied by the Supreme Court of the United States in the case of *United States* v. *Nixon,* U.S. (1974), 94 S. Ct. 3090, L. Ed. , where the Court, while recognizing the confidentiality of communications between the Chief Executive of the United States and his advisors, nevertheless unanimously held that the need of the Government prosecutor for the data sought to be disclosed in order to successfully prosecute the multiple criminal indictments arising out of the "watergate" affair was of far greater importance than the need of the President of the United States to protect his so-called executive privilege. Furthermore, it will be recalled that in that case the Court took pains to provide Judge Sirica with authority to screen the evidence sought to be produced before it was relased to the Government prosecutor in order to determine what was relevant for the purpose of prosecuting the "Watergate" indictments and what was not relevant, which, it is submitted, it is clear from the Record was the procedure that was followed at least by Magistrate Jacobs in the case at bar.

Appellants concede—as, of course, they have to—that, even under Section 501 of the new Federal Rules of Evidence, which do not become effective until July 1, 1975, or after the date that the order of Judge Knapp was made and entered herein, as well as under Section 43(a) of the present Federal Rules of Civil Procedure, the issue of privilege raised by them in the case at bar must be determined "by the principles of the common law", which in the care at bar would mean the principles laid down by the New York Court of Appeals in *Cirale* v. *80 Pine Street Corp.,* 35 N.Y. 2d 114, which was decided only last year and involves the same explosion and the same parties as are involved in the case at bar (Apps' Br. pp. 6-7). Although Appellants argue that "Judge Knapp's analysis of the opinion of the New York Court of Appeals in *Cirale* is incorrect" and that for this reason his order in the case

at bar "should be reversed and the motion to quash granted, or at the very least the case remanded for a new hearing" (Apps' Br., pp. 7-8), they fail to point out in what respect or respects his analysis of the opinion in the *Cirale* case is "incorrect".

It is submitted that the only difference between the *Cirale* case and the case at bar is that in the *Cirale* case the City claimed that the matters sought to be disclosed were privileged "under sections 1113 and 1114 of the New York City Charter", which the Court of Appeals held were "inapplicable" and "did not confer complete immunity from discovery, but merely exclude certain papers from the requirement of mandatory disclosure of public records" (34a).

In the case at bar Appellants have had a full and fair opportunity to meet the test for recognizing the privilege claimed, as laid down in *Cirale,* and, except for the matters referred to in the opinion of Judge Knapp, they have failed to do so.

Instead of attempting to meet the test of privilege so painstakingly outlined by the New York Court of Appeals in its opinion in the *Cirale* case, Appellants rely on the holding of the New York Court of Appeals in *Matter of Cherkis* v. *Impellitteri,* 307 N.Y. 132, which was decided back in 1954 and involved a situation entirely different from the one presently before this Court in the case at bar (Apps' Br., pp. 9-10). The *Cherkis* case involved the right of a taxpayer to inspect the reports of the Commissioner of Investigation of the City of New York concerning an investigation of charges against the Commissioner of Correction of the City of New York, which the Commissioner of Investigation had been ordered by the Mayor to make. The petition of the taxpayer for an order compelling the Mayor to permit such inspection to be made was properly denied on the statutory grounds discussed by the Court of Appeals in its opinion in that case.

It is submitted that there is no analogy whatever between the picture presented in the *Cherkis* case and the one presented by the *Cirale* case and the case at bar.

Wholly apart from the fact that in his opinion herein Judge Knapp literally applied the rule laid down by the New York Court of Appeals in *Cirale* v. *80 Pine Street Corp.*, 35 N.Y. 2d 113, it is submitted that it would be difficult to visualize a case where it would be more in the public interest that there be a disclosure of the facts developed by an official City investigation than in the case at bar, where seven innocent persons lost their lives in an explosion of catastrophic proportions. If there is any basis for a claim that the City of New York will suffer substantial harm from such a disclosure, it certainly is not demonstrated by the Record presently before this Court, although the City had ample opportunity to do so, assuming *arguendo* that such be the fact.

CONCLUSION

The order appealed from should be affirmed, with costs.

Dated: New York, New York, March 19, 1975.

Respectfully submitted,

JOSEPH ONORATO, Esq.
Attorney for Defendant-Appellee,
Adsco Manufacturing Corp.

WILLIAM F. MCNULTY
ANTHONY J. MCNULTY,
Of Counsel

(57768)

United States Court of Appeals
for the Second Circuit

376—Affidavit of Service by Mail — The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Mattie G. Dixon, as Administratrix of the Goods of L.C. Sherman Jr.
Plaintiff-Appellee

against

80 Pine Street Corporation, Rudin Management Corp. et al.
Defendants-Appellees

City of New York et al.
Appellants

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for Joseph Onorato Esq., being duly sworn deposes and says that he is the attorney for the above named Defendant-Appellee herein. That he is over 21 years of age, is not a party to the action and resides at Levittown, New York

That on the 21 day of March, 1975 he served the within

Brief

upon the attorneys for the parties and at the addresses as specified below

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by depositing 2 true copies to each
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,

that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 21st.
day of March, 1975

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975